ORIGINAL

No. 97-478

Supreme Court, U.S.
FILED
OCT 30 1997
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

STRUCTURAL FIBERS and ESSEF CORPORATION,

Petitioners,

v.

JAMES KULCH,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent, James Kulch, respectfully requests leave to file the attached Brief in Opposition to Petition for Certiorari without prepayment of costs and to proceed *in forma pauperis*. Mr. Kulch has not previously requested or been granted leave to proceed *in forma pauperis* in any court.

The decision below is an employment discrimination case involving retaliatory discharge, and Mr. Kulch has been unemployed since his termination from Structural Fibers in October, 1991. Moreover, injuries inflicted upon Mr. Kulch by Petitioner have rendered him unable to work, and he has collected Social Security Disability Income for the past several years. An Affidavit of poverty is attached in support of this Motion.

Respectfully submitted,

Patrick J. Perotti (0005481)
Susan E. Rusnak (0061892)
DWORKEN & BERNSTEIN
CO. L.P.A.
153 East Erie Street, Suite 304
Painesville, OH 44077
(440) 946-7656/352-3469

Counsel of Record for
Respondent James Kulch

CERTIFICATE OF SERVICE

One copy of Respondent's Motion for Leave to file Brief in Opposition to Petition for Certiorari, *In Forma Pauperis*, and Brief in Opposition to Petition, was sent via regular U.S. mail on this 30th day of October, 1997, to the following counsel:

Gregory Szuter, Counsel for Petitioner
Roetzel & Andress
1650 One Cleveland Center
Cleveland, OH 44114

Patrick J. Perotti (0005481)
Susan E. Rusnak (0061892)

Counsel for Respondent
James Kulch

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Jim Kulch, am the ~~Respondent~~ in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ___ No ✓
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received. October 1991

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes ___ No ✓ Collect Social Security Disability Income.

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or have a checking or savings account? Yes ✓ No ___

   a. If the answer is yes, state the total value of the items owned.
   Checking account for my wife's income, used to pay bills from paycheck to paycheck.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes ✓ No ___
   1984 Chevy van; 1985 Chevy Camaro.
   a. If the answer is yes, describe the property and state its approximate value.
   My wife and I own our house, are still paying mortgage.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on: October 15, 1997.

Susan Rusnak

SUSAN E. RUSNAK, Attorney
NOTARY PUBLIC - STATE OF OHIO
My Commission Has No Expiration Date
Section 147.03 O.R.C.

Jim Kulch
(Signature)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

STRUCTURAL FIBERS INC., and ESSEF CORPORATION,	)	CASE NO.
Petitioner,	)	
v.	)	**RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI**
JAMES KULCH,	)	
Respondent.	)	

Respondent, through counsel, herein submits his Brief in Opposition to the Petition for Certiorari.

Respectfully submitted,

Patrick J. Perotti, #0005481
Susan E. Rusnak, #0061892
DWORKEN & BERNSTEIN CO. L.P.A.
153 East Erie Street, Suite 304
Painesville, OH 44077
(440) 946-7656/352-3469

Counsel of Record for
Respondent James Kulch

JURISDICTION

Respondent emphatically objects to the Petitioner's characterization of jurisdiction in this case. First, the Petitioner's purported "federal question" or "federal conflict" was first raised in a motion to reconsider the Supreme Court of Ohio's decision below. Since Petitioner's assertion of the federal arguments was untimely, this Court is without jurisdiction to grant certiorari.

On the merits, Petitioner argues that the Supreme Court of Ohio has violated the "neutrality provision" of the Occupational Safety and Health Act, (OSHA), by citing that statute in support of Ohio's recognition of workplace safety as an important public policy. But the "neutrality provision" cited by Petitioner addresses only OSHA neutrality respecting workers compensation and personal injury cases involving "injuries, diseases or death of employees arising out of, or in the course of, employment." 29 U.S.C. Section 653(b)(4), OSHA Section 4(b)(4). It does not address the remedies of wrongful discharge in employment. Respondent, James Kulch, brought this case in tort, seeking Ohio statutory and common law remedies for wrongful discharge.

SUMMARY OF PROCEEDINGS BELOW

This case commenced when Respondent James Kulch filed suit against his former employer, Structural Fibers Inc., asserting claims of retaliatory discharge and other tortious conduct. Kulch asserted that his firing was motivated by his complaint to the Occupational Safety and Health Administration (OSHA). Kulch's claims sounded entirely in Ohio statutory and common law, including wrongful discharge in violation of Ohio public policy.

Because the public policy tort was newly announced in Ohio, the trial and appeals courts granted summary judgment in favor of Structural Fibers. The Ohio Supreme Court accepted the case for review, heard oral argument, and reversed. In pertinent part, the Ohio court found that Kulch could bring an Ohio common law claim for retaliatory discharge in violation of public policy because he complained to OSHA. Significantly, the Ohio Supreme Court did not borrow or use any standards from OSHA.

Following the Ohio Supreme Court's decision, Structural Fibers filed a motion for reconsideration. Structural Fibers argued, for the first time, that by finding an Ohio public policy in favor of promoting workplace safety to support the tort of wrongful discharge, the Supreme Court of Ohio violated Section 4(b)(4) of the OSHA statute. Ohio law mandates waiver of arguments which are not timely asserted. State ex. rel. Zollner v. Industrial Commission, 66 Ohio St.3d 276 (1993)(party who fails to raise an argument in court below waives right to raise it in Supreme Court); Thompson v. Preferred Risk Mutual Ins. Co., 32 Ohio St.3d 340 (1987)(same). Thus, the Supreme Court of Ohio refused to reconsider its decision.

Structural Fibers now petitions this Court for review.

ARGUMENT

I. Petitioner's federal arguments were not timely raised in the proceedings below, so certiorari should be denied.

Review by the United States Supreme Court is not a matter of right. Only the most compelling cases presenting federal questions or conflicts are granted certiorari. When review of state court decisions is sought, standards for review are more exacting:

> **[T]he claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice...**

Atlantic Coast Line R.R. Co. v. Mims, (1917) 242 U.S. 532.

In this case, Structural Fibers never raised its 4(b)(4) federal question argument until after the decision of the Supreme Court of Ohio, in its motion for reconsideration. According to Ohio pleading and practice, Structural Fibers had already waived that argument by not asserting it in the trial and appeals courts. State ex rel Zollner v. Industrial Commission, 66 Ohio St.3d 276 (1993); Thompson v. Preferred Risk Mutual Ins. Co., 32 Ohio St.3d 340 (1987). Therefore the Supreme Court of Ohio summarily denied Structural Fibers' motion for reconsideration.

Structural Fibers' failure to timely argue the federal issues bars not only reconsideration in the Supreme Court of Ohio, but this Court's review as well. This Court has declined to review decisions of state supreme courts, when the issue on which certiorari is sought was not raised until a motion for reconsideration of the state supreme court decision. See, e.g., Miller v. Cornwall, (1897) 168 U.S. 131, 133 (declining review of state supreme court decision construing a state statute, when argument on which certiorari is sought was not raised until motion for rehearing); McGarrity v. Delaware River Bridge Commission, (1934) 292 U.S. 19, 20 (dismissing appeal for "want of a properly presented substantial federal question," when it was not raised until motion for rehearing in state supreme court).

Because Structural Fibers never timely raised the federal OSHA 4(b)(4) question in the courts of Ohio, its Petition for Certiorari does not properly present a federal

question for this Court's review. Therefore, the petition should be dismissed.

II. OSHA does not preempt Ohio common law remedies for retaliatory discharge from employment for reporting concerns about workplace safety.

Petitioner principally argues that OSHA's so-called "neutrality provision," 29 U.S.C. Section 653(b)(4), OSHA Section 4(b)(4), precludes the State of Ohio from referring to the OSHA statute in support of common law employment discharge actions. This section provides:

> [N]othing in this Act shall be construed to supersede or in any manner affect any workers' compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of employment.

29 U.S.C. Section 653(b)(4), OSHA Section 4(b)(4). Petitioner argues that Ohio "may not use any part of OSHA, standards or otherwise, to affect state law in any way including employment discharge torts." Structural Fibers' Petition for Certiorari, p. 16.

Petitioner's argument is misplaced. The OSHA "neutrality provision" on its face only deals with physical injuries incurred in employment: "workers' compensation," and **"injuries, diseases, or death of employees arising out of, or in the course of employment."** Id. Section 4(b)(4) does not address wrongful discharge employment claims.

Legislative history concerning this section is equally instructive that this provision has nothing to do with wrongful discharges; rather, it is intended to avoid OSHA being used as a super, federal worker's compensation scheme, in derogation of state laws:

> Dear Mr. Chairman: This is in response to your recent request for information upon which to base a reply to Mr. James E. Bailey, Legislative Counsel, American Society of Insurance Management, Inc.

> **In his letter, Mr. Bailey expresses concern that under proposed legislation dealing with occupational health and safety "an injured employee could claim violation of the requirements of the legislation and thus bypass the applicable workmen's compensation benefits through an action in the Federal courts."**
>
> **The provisions of S.2788, the Administration's proposed Occupational Safety and Health Act of 1969 would in no way affect the present status of the law with respect to workmen's compensation legislation or private tort actions.**

Occupational Safety and Health Act of 1969: Hearings on H.R. 843, H.R. 3809, H.R. 4294 and H.R. 13373 before the Select Subcomm. on Education and Labor, 91st Cong., 1st Sess., Part 2 at 1592-1593 (letter of L.H. Silberman, Solicitor of Labor.) See also, Frohlick Crane Serv. Inc. v. Occupational Safety & Health Review Comm'n, (10th Cir. 1975) 521 F.2d 628, 631 ("by this particular provision Congress simply intended to preserve the existing private rights of an injured employee, which rights were to be unaffected by the various sections of the Act itself.")

Thus, the "neutrality provision," 29 U.S.C. Section 653(b)(4), limits only "workers' compensation" and "injuries, diseases, or death of employees arising out of, or in the course of, employment." In this area, the states may not inject OSHA regulations or standards to support a personal injury claim. So long as the terms of OSHA are not injected into state workers' compensation or personal injury actions, neutrality is respected:

> [W]hen a worker actually asserts a claim under the workmen's compensation law or some other state law, Section 4(b)(4) intends that neither the worker nor the party against whom the claim is made can assert that any OSHA regulation or the OSH Act itself preempts any element of the state law.

Startz v. Tom Martin Construction Co., (N.D. Ill. 1993) 823 F. Supp. 501, 505.

Petitioner argues that a state's injection of OSHA regulations or standards into its substantive personal injury law would risk interference with OSHA's preemption on health and safety issues. Section 18(a) of the OSH Act prohibits states' interference with "any occupational safety or health issue" for which federal standards are already in place. 29 C.F.R. 1901.2. An OSH "standard" within the scope of the act "requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. Section 652(8). Accord: Pratico v. Portland Terminal Co., (1st Cir. 1985) 783 F.2d 255, 266 (OSHA Section 4(b)(4) intended "to keep OSHA regulations from having any effect on the operation of the worker's compensation scheme itself.") But the problem is, this is a wrongful discharge case. This is not a situation where a state court is borrowing an OSHA provision, e.g. guardrails, to set the standard of care in a state law tort suit.

Respondent does not assert any claim implicating OSHA's substantive health and safety standards into Ohio law. These are the areas of law which are subject to the "neutrality" provisions of OSHA; Kulch's claims do not concern those provisions.

Rather, Respondent James Kulch brings his claim under the Ohio common law and statutory law which protects whistleblowers from retaliation in their employment. Petitioner concedes that Kulch exhausted his administrative remedies under OSHA, and that Kulch does not have a private cause of action under the anti-retaliation provision of that statute. His claim is grounded entirely in Ohio law.

State actions arising out of employment, including common law claims for employment discrimination and wrongful discharge, are wholly independent of the OSHA regulatory scheme. Accordingly, in employment discrimination cases alleging retaliation against the employee for complaining of OSHA violations, courts hold that state common law claims recognizing wrongful discharge in violation of public policy are not "neutralized" by OSHA. See, Kilpatrick v. Delaware County S.C.P.A., (E.D. Pa. 1986), 632 F.Supp. 542, 549-50; McElroy v. SOS International, (N.D. Ill. 1989), 730 F. Supp. 803, 807.

A retaliatory discharge claim based upon complaints of OSHA violations is not a "standard" as contemplated by OSHA's provisions, McElroy, supra, 730 F.Supp. at 807. Nor is it a physical "injury, disease or death incurred in employment" within the scope of the neutrality provision.

Because James Kulch's claim, and the decision of the Ohio Supreme Court, is based on Ohio common and statutory law, having nothing to do with the OSHA neutrality provisions; and the purported federal question of 4(b)(4) was not timely raised in proceedings below; Petitioner's request for certiorari is not well taken and should be denied.

Respectfully submitted,

Patrick J. Perotti (0005481)
Susan E. Rusnak (0061892)
DWORKEN & BERNSTEIN CO.
153 East Erie Street, Suite 304
Painesville, OH 44077
(440) 946-7656/352-3469

Attorneys for Respondent
James Kulch

HOWARD W. BERNSTEIN
DAVID M. DWORKEN*
MARVIN P. DWORKEN
MELVYN E. RESNICK
DAVID J. RICHARDS, JR.
PATRICK J. PEROTTI
IRVING ROSNER
ALEC BEREZIN
HOWARD S. RABB
PATRICK T. MURPHY
GARY S. OKIN
DEAN M. ROONEY
LISA M. SPANO-HARTING
SHAWN W. MAESTLE
GEOFFREY H. TUROFF
SUSAN E. RUSNAK
WENDY WEST FEINSTEIN
LAURA A. DePLEDGE

*SENIOR COUNSEL:

LAW OFFICES OF

DWORKEN & BERNSTEIN CO., L.P.A.

A PROFESSIONAL CORPORATION

PLEASE RESPOND TO:

CLEVELAND OFFICE:
55 PUBLIC SQUARE, SUITE 950
CLEVELAND, OHIO 44113
216/861-4211
FAX 216/861-1403

PAINESVILLE OFFICE:
153 EAST ERIE STREET
THIRD FLOOR
PAINESVILLE, OHIO 44077
216/352-3391 216/946-7656
FAX 216/352-3469

OF COUNSEL:
JEROME EMOFF

October 30, 1997

United States Supreme Court
Attention: Clerk of Court
1 First Street, N.E.
Washington, D.C., 20543

Re: Structural Fibers v. James Kulch, Case No. 97-478

Dear Clerk:

Please find enclosed one original and 9 copies of Respondent's Motion for Leave to file Brief in Opposition to Petition for Certiorari, Affidavit, and Brief, to be filed in the above captioned case.

Please call me at (440) 946-7656 if you have questions about the enclosed.

Very truly yours,

Susan E. Rusnak
Counsel for Respondent James Kulch

cc: Gregory Szuter,
Counsel for Petitioner

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SUPREME COURT, U.S.

97-478

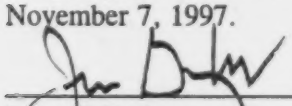
CERTIFICATE OF SERVICE

I, John Gallagher, hereby certify that 3 copies of the foregoing Petitioner's Reply Brief were sent via U.S. Mail to the following parties listed below this 7th day of November, 1997:

Gregory P. Szuter
Counsel of Record
Roetzel & Andress
1650 One Cleveland Center
Cleveland, OH 44114

Patrick J. Perotti
Dworken & Bernstein Co., LPA
153 East Erie Street, #304
Painesville, OH 44077

I further declare under penalty of perjury that the foregoing is true and correct. This Certificate is executed on November 7, 1997.



John Gallagher
Vice President
Becker Gallagher Legal Publishing, Inc.
Governor's Plaza
9134 Union Cemetery Road
Suite 313
Cincinnati, OH 45249
(513) 677-5044

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